

Murphy

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-219057.4

DATE: May 21, 1986

MATTER OF: Isometrics, Inc.--Reconsideration

## DIGEST:

1. A protester arguing that its bid is low, based on transportation rates in effect on bid opening date, is not obligated to monitor subsequent rate filings by carriers whose rates might be considered during cost evaluation. The General Accounting Office will not, therefore, dismiss an otherwise timely request for reconsideration because it is based upon information that the protester learned from rates filed during consideration of the initial protest.
2. A freight rate tender filed with the Military Traffic Management Command (MTMC) and available for use on bid opening date may be used to estimate transportation costs even though the tender contains a "lineal foot rule" that, if recognized, would have caused MTMC to reject the application for filing.

Isometrics, Inc. requests reconsideration of our decision in Isometrics, Inc., B-219057.3, Jan. 2, 1986, 86-1 CPD ¶ 2. We denied Isometrics' protest that the U.S. Army Troop Support Command improperly evaluated transportation costs under invitation for bids No. DAAJ10-85-B-A048. The protester now presents an additional new reason why we should find that the freight rate upon which the Army based its evaluation was not valid.

We affirm our prior decision.

Isometrics' initial protest concerned whether its bid to provide 556 metal storage tanks to the Army on an f.o.b. destination basis (i.e., for delivery to the Army facility) was lower than the bid of Beta Systems, Inc. for delivery on an f.o.b. origin basis (for delivery to a carrier at the bidder's facility). When, as here, an

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agency solicits offers on the basis of either f.o.b. origin or f.o.b. destination or both, the Federal Acquisition Regulation (FAR) requires that offers be evaluated to determine the lowest overall cost to the government. 48 C.F.R. § 47.305-2 (1984). Since the government must pay for the transportation of goods purchased on an f.o.b. origin basis, contracting officers must add the lowest available freight rates and related charges to f.o.b. origin bids in order to compare them with bids that included transportation to the government facility. See FAR, 48 C.F.R. §§ 47.306, 47.306-2. The freight rates used must be effective on or before the expected date of initial shipment and must be on file with the Military Traffic Management Command (MTMC) or published on the date of bid opening.<sup>1/</sup> FAR, 48 C.F.R. § 47.306-2; see also 39 Comp. Gen. 774 (1960).

In our January decision, we concluded that the Army had properly evaluated Beta's bid as low using rates tendered by Thunderbird Motor Freight Lines and Bowman Transportation, Inc. to estimate transportation costs between Beta's production facility in North Carolina and the destination point, Red River Army Depot in Texarkana, Texas. The protested contract will require shipment of 45 storage tanks a month, resulting in the shipment of 5 full truckloads of 8 tanks each and one less-than-full truckload of 5 tanks. The Army estimated transportation costs of the full truckload shipments using Thunderbird's rates. Since Thunderbird does not offer less than truckload (LTL) rates, the Army used the lowest LTL rate available, that of Bowman, for the single shipment each month that will not use a full truckload.

After we issued our decision, Isometrics learned that the Bowman tender contained a provision prohibited by the MTMC. In a memorandum to carriers dated September 30, 1983, MTMC had announced that the use of "lineal foot

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<sup>1/</sup> Common carriers subject to the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 10721 (1982) make offers (tenders) to transport goods for the government at reduced rates by filing and publishing rates. See FAR, 48 C.F.R. § 47.104-1.

rules" was prohibited,<sup>2/</sup> and that new tenders including such rules were unacceptable and would be rejected. Carriers were given until November 1, 1983 to amend their tenders as necessary. The memorandum provided that any tenders on file after that date that contained lineal foot rules would be subject to immediate removal from consideration for use. MTMC stated that its new policy resulted from the fact that charges based on lineal foot rules often exceeded charges that would otherwise be applicable, and such rules, along with a number of other tender provisions, lacked "economic justification or relationship to operating cost, revenues, competition, or business conditions."

In September or October 1985, MTMC discovered that the Bowman tender contained a lineal foot rule for some LTL shipments, and Bowman issued a new tender on October 4, effective November 4.

The protester contends that the Bowman tender was invalid and should not be considered to have been on file on the date of bid opening, May 8, 1985, as required by FAR, 48 C.F.R. § 47.306-2(a). Isometrics alternatively argues that its bid is low if the lineal foot rule, which is incorporated in Bowman's tender by reference to Southwestern Motor Conference tariff 190, is used in estimating Beta's transportation costs.

The Army's initial response to the request for reconsideration is that Isometrics should have known about the defect in Bowman's tender at the time the new filing was made in early October. Apparently, the Army believes that Isometrics should have monitored any filings by Bowman with the MTMC during the course of the protest. Since only freight rates filed or published at the time of bid opening could be used in the cost evaluation, filings made months later would ordinarily not be relevant. Thus, we do not believe that Isometrics was obligated to review filings by Bowman in October in connection with the evaluation of bids opened the previous May, and we have no evidence that the protester was otherwise tardy in raising the issue. We do not agree, however, that the new information establishes that our decision was in error.

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<sup>2/</sup> "Lineal foot rules" provide that certain shipments will be considered to weigh a certain amount per lineal foot for purposes of applying the applicable weight-based freight rate set forth in the tender.

MTMC's policy of not using tenders incorporating lineal foot rules because the agency does not consider them to be economically justified at this time does not mean that such tenders are void or invalid. The Bowman tender at issue here was filed and accepted by MTMC for use before the bid opening date. The tender was a continuing offer to furnish services to the government at special rates and charges, subject to the terms and conditions specified. See Star World Wide Forwarders, Inc., B-190757, July 28, 1978. Until such time as the offer was effectively revoked by Bowman, the tender enabled the government to make a contract by acceptance. See Starflight, Inc., B-212279, Nov. 13, 1984, 84-2 CPD ¶ 518.

While MTMC would presumably have rejected Bowman's tender when filed if the agency had recognized the lineal foot rule, once it was filed, the tender was available for use. See National Van Lines, Inc., B-180699, Oct. 2, 1974. In commenting on Isometrics' protest, MTMC states that many references to lineal foot rules are not easily detected; when they are discovered in tenders currently on file, the agency requires the carrier to delete the provision within 7 days or "risk removal from further routing consideration." MTMC reports that since 1983, charges based upon lineal foot rules have not been accepted when encountered during postshipment audits. Thus, MTMC considers the tenders on file to be valid, but, as stated in its 1983 memorandum proscribing lineal foot rules, the tenders are "subject to" not being considered for use. This treatment is consistent with our view that MTMC's format and content requirements for filing tenders may be waived by the agency. Star World Wide Forwarders, Inc., supra.

We find that the Army could properly use the Bowman tender for estimating transportation costs in the protested procurement. The tender was filed and available for use at the time of bid opening. While it contained an objectionable rate provision, the tender was not void or invalid for that reason, and it was not considered so by MTMC. Moreover, as noted above, MTMC's policy against lineal foot rules stems from its desire to obtain the most economic rates for the government, not for any reason of public policy that might in itself make use of the tender in question legally objectionable.

Finally, the Bowman tender does not, as suggested by Isometrics, require the use of a lineal foot rule in determining the freight rate for the Army's storage tanks.

The rule incorporated in Bowman's tender applied to the shipment of articles in excess of 20 lineal feet each, while the storage tanks are approximately 5 feet long.

We find that the Army's use of Bowman's LTL weight-based rate for estimating Beta's transportation costs was reasonable and consistent with applicable regulations. For this reason, we affirm our prior decision.

*Harry R. Van Cleve*

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General Counsel